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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ALLAN ROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the admission into evidence of transcripts of conversations electronically intercepted in Spain without the production of the recordings themselves was impermissible under Fed. R. Evid. 1004 and violated the defendant's right to due process of law and fundamental fairness as guaranteed by the Fifth Amendment to the United States Constitution.

II. Whether 18 U.S.C. §3505 and the application thereof in this case violated the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution by authorizing the admission of foreign records of regularly conducted activity through a certificate of the records custodian, thereby denying a criminal defendant the right to confront and cross-examine the custodian of the records or

other qualified witness to which he would be entitled in the case of domestic records under Fed. R. Evid. 803(6).

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OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 33 F.3d 1507 (11th Cir. 1994).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 11, 1994. Petitioner's timely request for rehearing was denied on January 20, 1995.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Because the Petition for Rehearing was denied on January 20, 1995, more than the ninety days provided by Supreme Court Rule 13.1 have elapsed since the denial of petitioner's Petition for Rehearing.[1] The

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[1]With respect to the reasons that this Petition is being filed more than ninety days following the denial of petitioner's petition for rehearing by the Eleventh Circuit Court of Appeals, the undersigned counsel, Kimberly Homan, who is a member of the bar of this Court, makes the following representations to this Court. Ms. Homan

ninety day rule is not jurisdictional and may be waived by this Court. See, e.g., Sanabria v. United States, 437 U.S. 54, 62 n.12 (1978); Durham v. United States, 401 U.S. 481, 481-82 (1971); Schacht v. United States, 398 U.S. 58, 63-65 (1970);

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was the attorney responsible for the preparation and filing of this Petition. Shortly after receiving notice from the Eleventh Circuit that petitioner's petition for rehearing had been denied, she entered the filing deadline for the Petition for Writ of Certiorari in this case in her calendar. However, she erroneously entered the filing deadline on the page in her calendar for May 22, 1995. At the time this error was made, Ms. Homan was in the midst of an acute family crisis involving the hospitalization of her teenaged daughter and, as she has never before missed a filing deadline in her seventeen years in the practice of law, she believes that the calendaring error was likely the product of this crisis. On May 9, 1995, in preparation for the filing of this Petition by or before May 22, 1995, Ms. Homan reviewed the materials required to be included in the appendix to the Petition and discovered the error. She immediately contacted the Clerk's Office for this Court to ascertain the proper procedure to be followed and immediately began finalizing this Petition so that it could be filed as soon as possible after the error was discovered.

Taglianetti v. United States, 394 U.S. 316, 317 n.1 (1969); Heflin v. United States, 358 U.S. 415, 418 (1959).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

> have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. §3505 provides:

§ 3505. Foreign records of regularly conducted activity

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that --

> (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
> (B) such record was kept in the course of a regularly conducted business activity;
> (C) the business activity made such a record as a regular practice; and
> (D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term --

(1) "foreign record of regularly conducted activity" means a memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;
(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and
(3) "business" includes business, institution, association, profession, occupation, and calling of every

kind, whether or not conducted for profit.

Fed. R. Evid. 1004 provides:

Rule 1004. Admissibility of other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if --

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by an available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

STATEMENT OF THE CASE

Defendant was charged in a three count superseding indictment with engaging in a continuing criminal enterprise in violation of 21 U.S.C. §848 (Count I), and with conspiracy to import, to distribute, and to possess with intent to distribute marijuana and cocaine (Counts II-III). Following the return of a jury verdict of guilty, as to each of these counts, defendant was sentenced to concurrent terms of life imprisonment on all counts, a ten million dollar fine, and payment of the cost of his confinement.

One month before trial, the government filed an amended response pursuant to Rule 16 of the Federal Rules of Criminal Procedure stating that it intended to introduce transcripts of conversations, in some of which it contended that defendant was a participant, intercepted in Spain by the Spanish National Police, which the

defendant moved in limine to exclude. At trial, following a voir dire hearing, the government was permitted to introduce, over defendant's objection, transcripts of certain conversations as to which no tape recordings were available, the recordings having allegedly been destroyed by the Spanish police. At trial and on appeal, defendant contended that these transcripts were inadmissible under the standards established in United States v. Onori, 535 F.2d 938 (5th Cir. 1976), that they were not admissible under Fed. R. Evid. 1004, and that the admission of these transcripts in the absence of the tapes themselves deprived defendant of any meaningful opportunity to challenge their accuracy and reliability, in violation of defendant's right to due process of law as guaranteed by the Fifth Amendment. The Eleventh Circuit concluded that, because the tapes were not available, Onori was inapplicable,

United States v. Ross, 33 F.3d 1507, 1514 n.9 (11th Cir. 1994), that the transcripts were admissible under Fed.R.Evid. 1004, id. at 1513-14, and that the admission of the tapes did not violate the due process clause, id. at 1514 n.10.

The Marbella Club[2] interceptions, from which the transcripts attributed to defendant were said to be derived, began on January 30, 1988. The conversations in which the defendant was purported to have been a participant were all conducted in English. Joaquin Manich, a former Spanish National Police officer, testified that he prepared the typewritten transcripts which comprise Exhibits 77-78 and 122-124 by listening to the master tape once and then translating the "interesting" conversations into Spanish, without first making an English transcription. Those "important"

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[2] A resort complex in Marbella, Spain.

conversations were then transferred to cassette, upon which the master tape was returned to circulation. As to Exhibits 125-126, Manich listened to the master tape, transferred "the ones he wanted" to cassette, erased the remainder, and then wrote out a Spanish translation in longhand, which he left to be typed by someone else, along with the corresponding cassettes. Before their admission into evidence, these Spanish transcripts of English conversations, prepared by a Spanish police officer, were retranslated into English by a Gainesville, Florida, police officer from Puerto Rico, who had never heard the original tapes.

Manich testified that the cassettes should have been in existence at the time of trial, as standard procedure called for the team leader to either keep the cassettes in his office or to return them to the judge who issued the warrant.

However, Miguel Blanco, the Spanish National Police officer who had transcribed the conversations intercepted over co-conspirator David Sabio's telephone line, testified that the cassettes onto which the "important" conversations are transferred are routinely destroyed after a period of time, unless the authorizing judge had requested a copy, and that, therefore, neither the master tapes nor the cassettes at issue in this case would still exist. Manich further testified that, while he had never seen or spoken with Ross, he could identify Ross' voice because on occasion Ross or someone else had mentioned his name during a conversation -- although this was not the case with respect to any of the transcripts introduced into evidence -- and that he had become familiar with Ross' voice by listening to the tapes.

In response to the government's Notices of Intention to Introduce Into

Evidence Foreign Records of Regularly Conducted Activity, the defendant filed a Motion in Limine seeking exclusion of this evidence. At trial, over defendant's objection, numerous foreign records, including computerized printouts generated in Aruba as a result of a computer search for the names of various individuals, were admitted pursuant to 18 U.S.C. §3505. At trial, and on appeal, defendant contended that §3505, in that it permits the introduction of foreign records with only the certificate of the custodian and dispenses with the requirement that the proponent of the records produce an individual to establish the requisite foundation, subject to cross-examination, violates the Confrontation Clause of the Sixth Amendment. The Eleventh Circuit upheld the constitutionality of the statute, both facially and as applied. United States v. Ross, 33 F.3d at 1515-17.

Through DEA Agent Carl Lilley, the government was permitted to introduce computer printouts of Aruban customs and immigration data, purporting to reflect entries into Aruba by a number of persons, including, most critically, the petitioner and co-conspirators William Blackledge and Angel Sanchez, along with other information such as the hotel at which each intended to stay, the airline on which each had arrived, and the length of their intended stays, Ex. 38. Lilley, who had no personal knowledge of these records, supplied no information regarding their provenance other than that he had travelled to Aruba to obtain the printouts from an Aruban narcotics officer with no connection to Aruban customs or immigration.

REASONS WHY THE WRIT SHOULD BE GRANTED

The issues on which the Writ is sought raise starkly, in two different contexts, several interrelated questions of exceptional importance in any federal criminal prosecution in which the evidence has an international component: May a defendant be deprived of fundamental constitutional rights because of the international origin of the evidence? May carefully developed caselaw and common law principles, arrived at through a careful process of balancing the respective interests at stake, be discarded where the evidence emanates from a foreign jurisdiction whose procedures are less protective than ours of individual rights? In short, does evidence which would be inadmissible under identical circumstances if it were of domestic origin become admissible because protections afforded a defendant from the presentation to the jury

of unreliable evidence are to be jettisoned on the basis of the enhanced difficulties inherent in complying with established law where foreign evidence is concerned? The opinion of the Eleventh Circuit essentially answers these questions in the affirmative. While the circumstances presented in this case are somewhat unusual, the opinion of the Eleventh Circuit has broad, and potentially dangerous, ramifications for the rights of all criminal defendants confronted with evidence of foreign derivation or with what purport to be transcripts of destroyed recordings of intercepted conversations.

ARGUMENT

I. THE OPINION OF THE ELEVENTH CIRCUIT WHICH AFFIRMED THE TRIAL COURT'S DECISION TO ADMIT INTO EVIDENCE TRANSCRIPTS OF THE RECORDINGS OF TELEPHONE CONVERSATIONS ELECTRONICALLY INTERCEPTED IN SPAIN BY THE SPANISH NATIONAL POLICE ALTHOUGH THE TAPES WERE NOT PRODUCED IS INCONSISTENT WITH DEFENDANT'S FIFTH AMENDMENT RIGHTS TO FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW AND IS NOT PERMITTED BY FED.R.EVID. 1004

What this Court is asked to review, and what the Eleventh Circuit completely ignores, is the central role which the availability to the defendant of the tape recordings themselves plays in ensuring the defendant a full and fair opportunity to challenge the accuracy of the government's transcripts and the identification of the speaker therein. Both the Eleventh Circuit and other Courts of Appeals have carefully articulated procedures to be followed in submitting transcripts of tape recorded conversations to the jury and have

prescribed an adversarial process for deriving such transcripts and for the presentation of evidence regarding the accuracy or reliability of those transcripts. What all these cases have in common -- and what is absent in this case -- is that the admissibility of transcripts was predicated upon the availability of the recordings themselves to defense counsel, thus enabling the defendant to challenge the accuracy of the transcripts and of the critical voice identifications.[3] Such adversarial testing, which was impossible in this case, is essential to the notions of fundamental fairness and due process which underlie the procedures articulated, for example, in United States v. Onori,

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[3] The petitioner at all times maintained that he was not a participant in these conversations.

supra.[4] Most critically, "[t]he Onori procedure allows the jury to judge the accuracy of the transcript, which is really at issue, rather than the transcriber's credibility in testifying that he made an accurate transcript." United States v. Rochan, 563 F.2d 1246, 1252 (5th Cir. 1977) (emphasis added).

The Onori procedure is fully applicable when the transcripts at issue are English language translations of

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[4]See, e.g., United States v. Stone, 960 F.2d 426, 436 (5th Cir. 1992); United States v. Branch, 970 F.2d 1368, 1371 (4th Cir. 1992); United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 824 (9th Cir.), cert. denied, 471 U.S. 1139 (1985); United States v. Garcia, 854 F.2d 1280, 1283 (11th Cir. 1988), cert. denied sub nom. Lovett v. United States, 489 U.S. 1097 (1989), and sub nom. Cruz v. United States, 494 U.S. 1008 (1990); United States v. Nixon, 918 F.2d 895, 901 (11th Cir. 1990); United States v. Gonzalez-Balderas, 11 F.3d 1218, 1224 (5th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 2138 (1994); United States v. Hogan, 986 F.2d 1364, 1376 (11th Cir. 1993).

foreign language tapes. Indeed, the opportunities to challenge the evidence guaranteed by Onori are even more critical in this context, as the issue is not simply whether the written words of the transcript are the same as the words spoken but also whether the foreign language has been accurately translated in terms of context, usage, sense and meaning.

> [The Onori] procedure is well-suited to cases ... where the transcript is an English language translation of a foreign language conversation. Such a procedure does not tie a defendant to an "official" transcript prepared by the prosecution, nor does it "usurp" the fact finder's function. If there is a dispute as to the contents of a foreign language recording, the burden will be on the respective parties to present transcripts or other evidence to support their version of the conversation.

United States v. Llinas, 603 F.2d 506, 509-10 (5th Cir. 1979)(emphasis added), cert. denied, 444 U.S. 1079 (1980). See, e.g., United States v. Cruz, 765 F.2d 1020 (11th

Cir. 1985); United States v. Armijo, 5 F.3d 1229, 1234 (9th Cir. 1993). Without the benefit of the underlying source materials -- the tape recordings themselves -- the transcripts remain largely exempt from the crucible of adversarial testing, the assurance of which lies at the heart of the procedures developed in Onori and other cases.

What is so much a given in previous jurisprudence on the subject is the assumption that such transcripts would not be admissible in a criminal case in the absence of the underlying recordings. The fundamental teaching of these cases is that, absent a full opportunity for adversarial testing, transcripts of conversations should not be submitted to the jury. The extraordinarily anomalous -- and unacceptable in terms of due process and fundamental fairness -- result of the Eleventh Circuit's opinion is that a

criminal defendant is entitled to a full panoply of procedural safeguards when recordings have been preserved but to none if they have not.[5] This is precisely the

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[5] Defendant did not, as the Circuit Court states, have an "ample opportunity to attack the transcripts' credibility." United States v. Ross, 33 F.3d at 114; see also id. at 1525-26 (Black, J., concurring specially). It is abundantly clear from our jurisprudence that such an opportunity, to comport with fundamental fairness, must include at a minimum the opportunity to compare the government's transcripts with the tapes themselves. Moreover, in this case, defendant was not notified until a month prior to trial that the government would seek to introduce the transcripts and only sometime thereafter that the tapes themselves would not be produced. Defendant, therefore, had no opportunity prior to trial to attempt to develop independent material to impeach the accuracy of the transcripts and, most critically, the accuracy of the identification of him as one of the speakers. Defendant requested prior to trial that he be provided with copies of the documents underlying the interceptions, including applications, affidavits, orders, and surveillance logs, which request was reiterated during trial, as the relevant witness indicated on voir dire that the documents could be faxed from Spain. His requests were opposed by the government and denied by the trial court, except as to those documents already in the possession of the government. None were produced.

result of the Eleventh Circuit's holding that, because the tapes were unavailable, the transcripts were admissible under the best evidence rule, Fed. R. Evid. 1004, which holding creates a highly dangerous disincentive to careful preservation of recorded conversations if the government may obtain the admission of transcripts created by it by developing a sufficiently plausible reason to explain the nonavailability of the recordings themselves. The inescapable reality of the transcription process is that one transcriber may genuinely hear one thing while another hears something quite different -- and the potential discrepancies are only magnified by the English to Spanish to English translation process. Even more critically, one person may identify the speaker as "A" while another may be equally sincerely emphatic that the speaker is in fact "B". The best

evidence rule cannot be employed as the Eleventh Circuit did to entirely eviscerate the crucial procedural protections mandated by the Fifth Amendment.

In any event, Rule 1004 is simply inapplicable where, as here, what is sought to be proven is not in fact the contents of a tape recording but rather the existence and content of conversations which may or may not have taken place in Spain, i.e., the occurrence or nonoccurrence of an event and not the contents of a recording.[6] This distinction is exemplified by Wright v. Farmers Co-op, 681 F.2d 549 (8th Cir. 1982), relied upon by the Eleventh Circuit, in which a transcription of a witness statement taken by an insurance adjuster,

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[6] See, e.g., United States v. Howard, 953 F.2d 610, 612 (11th Cir. 1992); United States v. Gonzalez-Benitez, 537 F.2d 1051, 1053 (9th Cir.), cert. denied, 429 U.S. 923 (1976); United States v. Rose, 590 F.2d 232, 237 (7th Cir.), cert. denied, 442 U.S. 929 (1979).

the recording of which had been lost or destroyed, was admitted under Rule 1004 through the testimony of the adjuster, who was fully subject to cross-examination. At issue was the contents of the recorded statement, a considerably different question than that presented here, where the contents of the recording are not the issue. Even so, the Wright court termed the admissibility of the transcribed statement -- in a civil case -- a "close question." Id. at 553. The fairness and due process concerns -- as well as Confrontation Clause protections --which are implicated in criminal cases, unlike civil cases, compel the conclusion that Rule 1004 may not be invoked to deprive a defendant of the protections of fundamental fairness.

Contrary to the Eleventh Circuit's discussion, the facts in United States v. Maxwell, 383 F.2d 437 (2nd Cir. 1967),

cert. denied, 389 U.S. 1057 (1968), are not at all comparable to those presented in this case. Two critical distinctions dispositively differentiate Maxwell from this case, for in Maxwell the defendant did not challenge the accuracy of the transcript and, most importantly, the other participant in the conversation testified to the content of the conversation. Neither Wright nor Maxwell support the admission of the transcripts in this case. Maxwell is the only reported appellate decision, before the opinion in this case, to have ever approved the admission of a transcript of a destroyed recording in a criminal case. Maxwell did not hold the transcript admissible under Rule 1004, as Maxwell predated the adoption of the Federal Rules of Evidence.[7] There is,

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[7] Maxwell was also decided before the enactment of Title III, 18 U.S.C. §2510, et seq., and well before the appellate courts of this country began prescribing

accordingly, no reported appellate decision authorizing the admission in a criminal case of a transcript of a lost or destroyed recording of an intercepted conversation under Rule 1004 except for the Eleventh Circuit opinion in this case.

II. 18 U.S.C. §3505 VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IN THAT IT PERMITS THE INTRODUCTION OF FOREIGN RECORDS ACCOMPANIED ONLY BY A CERTIFICATE OF THE CUSTODIAN AND THEREBY DENIES A CRIMINAL DEFENDANT HIS RIGHT TO CONFRONT AND CROSS-EXAMINE THE RECORDS CUSTODIAN.

The records at issue in this case would not have been admissible had they been domestic records of regularly conducted activity, see, e.g., United States v. McClintock, 748 F.2d 1278, 1292 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985); United States v. Davis, 571 F.2d 1354, 1358 (5th Cir. 1978); because,

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procedures to govern the admissibility of transcripts.

however, they are said to be records maintained in the regular course of business in a foreign country, 18 U.S.C. §3505 permits their admission without affording defendant the right to confront and cross-examine a "qualified witness" which is mandatory under Fed. R. Evid. 803(6), the cognate provision applicable to domestic records. "[T]he purpose of enshrining [confrontation clause] protection in the Constitution was to ensure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 3171 (1990) (Scalia, J., dissenting). In enacting §3505, Congress intended to streamline the formerly cumbersome procedures for authentication of foreign documents; however, a goodly portion of that "cumbersomeness" involved

authentication proceedings in foreign countries which the defendant or his counsel had the option of attending if they wished to contest the authenticity or accuracy of the documents at issue, thus safeguarding the defendant's confrontation clause rights. Indeed, two of the cases which have considered the constitutionality of §3505, including Miller, the principal case relied upon by the Eleventh Circuit, predicated their holdings in part upon the defendant's ability to depose the foreign recordkeeper in an effort to expose inaccuracy or inauthenticity. See, e.g., United States v. Miller, 830 F.2d 1073, 1078 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); United States v. Hing Shair Chan, 680 F.Supp. 521, 522-23 (E.D.N.Y. 1980). See also United States v. Davis, 767 F.2d 1025, 1031 (2nd Cir. 1985). In this case, the government did not serve a §3505(b) notice upon defendant until a

month before trial, and as to the Aruban records, not until less than a week before trial. Defendant's request, pursuant to Fed. R. Crim. P. 15(a) and 18 U.S.C. §3507, that he be permitted to take foreign depositions was denied by the district court.

The Miller opinion, upon which the panel placed its primary reliance, dismissed in one sentence the possible efficacy of cross-examination of the records custodian, an analysis entirely at odds with the large body of caselaw which has developed under Rule 803(6) which stresses quite the opposite. Rule 803(6) already represents an accommodation between the interests of efficient presentation of evidence and the defendant's confrontation clause rights, which accommodation may not be further expanded to eradicate the defendant's confrontation clause rights in

the interests of expediency.[8] While the Rule 803(6) exception exempts the proponent from the necessity of producing the preparer of the records, he must nonetheless produce someone familiar with the recordkeeping systems of the entity whose records are sought to be introduced, see, e.g., United States v. Pelullo, 964 F.2d 193, 201 (3rd Cir. 1992), to testify at trial regarding the foundational prerequisites of Rule 803(6), to preserve the defendant's right of confrontation and cross-examination. See, e.g., United States v. Hayes, 861 F.2d 1225, 1230 (10th Cir. 1988); United States v. Norton, 867

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[8] Moreover, the reliance by Miller and by the Eleventh Circuit in this case upon the deterrent value of foreign criminal penalties for perjury, is misplaced -- not only is foreign prosecution for perjury in conjunction with the execution of a §3505 certificate highly unlikely, but also, most critically, a foreign recordkeeper could truthfully attest to all of the §3505 elements even though the records themselves might be inaccurate.

F.2d 1354, 1364 (11th Cir. 1989); United States v. Briscoe, 896 F.2d 1476, 1495 (7th Cir.), cert. denied sub nom. Usman v. United States, 498 U.S. 863 (1990). Rule 803(6) satisfies the requirements of the confrontation clause only "where documents are properly admitted under that section." United States v. Norton, 867 F.2d at 1363.

The live testimony of a qualified witness is, therefore, an essential component of the sufficiency of the guarantees of trustworthiness under Rule 803(6); the Eleventh Circuit, in concluding that a foreign certificate provides an adequate guarantee of trustworthiness to permit the evidence to be admitted without falling afoul of the Sixth Amendment, effectively accords a greater presumption of reliability to foreign records than is afforded domestic documents. Hearsay which does not fall within a firmly rooted hearsay exception -- such as Rule 803(6)

with its express guarantee of a recordkeeper to cross-examine -- is "presumptively unreliable and inadmissible for Confrontation Clause purposes and must be excluded absent particularized guarantees of trustworthiness." United States v. Ross, 33 F.3d at 1516, citing Ohio v. Roberts, 448 U.S. 56, 66 (1980). The Circuit Court noted that such particularized guarantees of trustworthiness "must be such that the evidence is equally reliable as evidence admitted under a firmly rooted hearsay exception to ensure that confrontation through cross-examination would add little to its believability," United States v. Ross, 33 F.3d at 1516 (emphasis added). Foreign documents admitted via the certificate of a foreign recordkeeper not subject to cross-examination can hardly be said to share "equal reliability" with domestic documents admitted through the

live testimony of a qualified witness subject to cross-examination.

The Aruban computer printouts provide a paradigmatic example of why §3505 must be found invalid under the Sixth Amendment. In the context of domestic computer printouts offered pursuant to Rule 803(6), courts have recognized that such evidence demands enhanced scrutiny, with particular emphasis upon the manner in which the data was entered into the computer, how it was stored, maintained, and retrieved, and how the particular printout at issue was generated.[9] An opportunity to rebut the proffered foundation for computer-generated records is an essential prerequisite to

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[9] See, e.g., United States v. Catabran, 836 F.2d 453, 457 (9th Cir. 1988); United States v. Glasser, 773 F.2d 1553, 1559 (11th Cir. 1985); United States v. Sanders, 749 F.2d 195, 198 (5th Cir. 1984); United States v. Scholle, 553 F.2d 1109, 1125 (8th Cir.), cert. denied, 434 U.S. 940 (1977).

their admissibility.[10] Admission of such records under §3505 completely denies criminal defendants the opportunity for such cross-examination which is guaranteed in the context of domestic computer printouts.

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[10] See, e.g., United States v. Hayes, 861 F.2d 1225, 1230 (8th Cir. 1988); United States v. Croft, 750 F.2d 1354, 1365 n.7 (7th Cir. 1984); United States v. Briscoe, 896 F.2d 1476, 1495 (7th Cir. 1990); United States v. Fendley, 522 F.2d 181, 187 (5th Cir. 1975).

CONCLUSION

For all the foregoing reasons, petitioner prays that this Honorable Court grant a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,
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